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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

JAMES MARLO DUFFIN, JR.,

Defendant and Appellant.

B194549

(Los Angeles County
Super. Ct. No. NA063073)

In re

JAMES MARLO DUFFIN, JR.,

on

Habeas Corpus.

B201798

APPEAL from a judgment of the Superior Court of Los Angeles County, Joan Comparet-Cassani, Judge. Affirmed.

PETITION for writ of habeas corpus. Writ denied.

Daniel G. Davis and Steven Graff Levine for Defendant, Appellant and Petitioner.

Edmund G. Brown Jr., Attorney General, Dane R. Gillete, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Susan D. Martynec and Russell A. Lehman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted defendant and appellant James Marlo Duffin, Jr. of a lewd act on a child. His primary contentions on appeal concern alleged error in admitting propensity and other acts evidence under Evidence Code sections 1101, subdivision (b), and 1108.¹ He specifically contends that the magistrate's dismissal of two counts after the preliminary hearing precluded the People from thereafter introducing evidence of those uncharged crimes at trial. He also argues that evidence he was warned not to be alone with students, that he locked his door, and that he covered his classroom door window with construction paper was not admissible under section 1101, subdivision (b). We reject these, and defendant's other claims of instructional, evidentiary, and prosecutorial errors. We also deny the petition for writ of habeas corpus, in which defendant contends that newly discovered evidence requires a new trial. We therefore affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

A. *The charged crimes: The three incidents of touching at Elementary School A in 2004.*

1. Sadie T.

Sadie T. was born in April 1994. When she was 10 years old, in September 2004, Sadie T. was in the fifth grade at elementary school A. Defendant was her teacher. After school one day, Sadie T. and Guadalupe B. went to defendant's classroom to get candy he had promised them for helping him. The classroom lights were off. Defendant was sitting at his desk. While Sadie T. was on defendant's right side looking at an origami book, defendant touched her right shoulder. He moved his hand down her back and touched her buttocks. She moved away, but he grabbed her waist and shoved her back to him. She moved away again and left with Guadalupe B.²

¹ All further undesignated statutory references are to the Evidence Code.

² A few days before the incident, defendant moved Sadie T.'s seat from the back, where she sat with her friends, to the front, where she sat with "weird kids."

A few days later, Sadie T. and a friend told the yard supervisor what happened. The supervisor told Kim Polk, the assistant principal. Sadie T. did not tell anyone sooner because she was afraid her father would go after defendant. The touching made her feel she was “being used, like as a toy.”

Guadalupe B. said that after recess, in defendant’s classroom, she saw defendant touch Sadie T.’s buttocks once.

Griselda L. also saw defendant touch Sadie T.’s buttocks and move his hand down to her legs.³ Griselda L. said the incident occurred during recess with six other students, including Guadalupe B., Claudia M., Griselda L., and Jennifer, in the room. Two weeks after the incident, they told the yard supervisor what had happened. Sadie T. also told Griselda L. that defendant had touched her one time before this incident.

2. Guadalupe B.

Guadalupe B. was Sadie T.’s classmate and friend. When Guadalupe B. was nine years old, on September 17, 2004, she was correcting papers in defendant’s classroom either during recess or after school. Defendant told her she was doing a good job. While he stood behind her, defendant put his hand on Guadalupe B.’s right shoulder and moved his hand down to above her breast. Defendant did not, however, touch any part of her breast. She was scared.

Guadalupe B. didn’t tell anyone what happened at the time, but she finally told Kim Polk about it at the same time she told her what had happened to Sadie T.

3. Claudia M.

Claudia M., who was 10 years old in September 2004, was also one of defendant’s students at elementary school A. One day during recess, Claudia M. was in a classroom.

³ Griselda L. told Officer Cheron Bartee, however, that defendant touched Guadalupe B.’s shoulder and butt. She did not add that defendant worked his way down Guadalupe B.’s legs.

As she was leaving the room, defendant hugged her face to face and touched her buttocks, moving his hand in an up and down motion.⁴ She was scared.

B. *The children report the touchings to Kim Polk.*

Kim Polk, elementary school A's assistant principal, became aware of the Sadie T. incident when a supervision aide came into her office with Sadie T. on September 23, 2004. Sadie T. said an incident had occurred a week before, on September 17, 2004. She said defendant had touched her buttocks. Sadie T. demonstrated what had happened by sliding her hand down her back slowly and touching her buttocks and her breast. Polk had Sadie T. write a statement, in which Sadie T. did not say defendant touched her breast.⁵

Polk also talked to Guadalupe B., whom Sadie T. had identified as being present when defendant touched her. Guadalupe B. told her she did not know if Sadie T. was telling the truth because she did not see the incident, although Sadie T. did tell her and Griselda L. it had happened. Guadalupe B. thereafter told a school psychologist that defendant touched her breast. About three weeks prior, defendant had come up behind her and slid his hand down her shoulder and touched her breast.

On October 1, 2004, Claudia M. told Polk that she had once been helping defendant in his classroom and, as she was exiting class, he pulled her into a hug and touched her buttocks in an up and down motion with both hands. She did not know if the touching was intentional.

Polk interviewed Griselda L. who said she saw defendant rub Sadie T.'s back on several occasions.

⁴ On cross-examination, Claudia M. said defendant's hand brushed her buttocks. Two boys were behind her in the classroom when the touching allegedly occurred.

⁵ On cross-examination, Polk testified that Sadie T. told her that defendant touched her breast and slid his hand down her back to her buttocks. She pushed him away. He put his arm around her waist, pulled her back to him, and slid his hand and touched her buttocks a second time.

C. *The uncharged crimes: The alleged prior incidents of touching at Elementary School B in 2001.*

1. Ana M.

Ana M. testified about two incidents of touching, one involving herself and the other involving Guadalupe G. In May 2001, Ana M. was in the fourth grade at elementary school B. She was about 10 years old. Defendant taught at her school, but he was not her teacher. One day, she, Guadalupe G., Damaris G., and Paulina A. were making boxes for silkworms. Defendant asked all of them to leave the room, except Guadalupe G. They left. Through a window in the door, Ana M. saw defendant corner Guadalupe G. She couldn't see anything else because defendant's back was facing her, but Guadalupe G. came out of the room crying. Guadalupe G. told them what happened, and Ana M. told her to tell her parents. She did not recall telling Sergeant Mark Bassett that she saw defendant hug Guadalupe G. and put his hand on her buttocks.

Ana M. and defendant had a separate encounter. Ana M. was stapling paper and putting stamps on envelopes with Paulina A., Damaris G., and Guadalupe G. They then played tag with defendant, who came up behind Ana M. and put his hand under her shirt, but he did not touch her breast.⁶ She took his hand away. She was scared. That same day she told her mom what had happened. Ana M. did not remember telling Sergeant Bassett that defendant put his hands by the front of her neck or that she did not tell him that defendant touched her breast. She did not recall telling Damaris G. that defendant had just told her she was a nice person and there was no touching.

2. Damaris G.

In May 2001, Damaris G. was a student at elementary school B. She was 10 years old. One day that May, she was in a classroom with Guadalupe G., Ana M. and Paulina A. playing hide and seek. Defendant approached her from behind and rubbed her neck

⁶ Ana M.'s testimony regarding this issue is ambiguous. She testified on direct examination that defendant's hand did not actually touch her breast. His hand was "halfway" from her chest. On cross-examination, she said defendant did touch her breast.

and upper chest with one hand. His hand was going lower, and Damaris G. asked what he was doing. He said he was sorry. She told Ana M. that defendant touched her neck, and Ana M. told her that defendant had touched her neck too.

Damaris G. also witnessed an incident between defendant and Guadalupe G. Damaris G. and three other girls were in a classroom with defendant, when he told all of them, except Guadalupe G., to go outside. Damaris G. saw defendant rub Guadalupe G.'s back and go lower to her buttocks. When he reached Guadalupe G.'s buttocks, Damaris G. looked away. Guadalupe G. came out of the room sad, but not crying.

3. Sergeant Mark Bassett.

Sergeant Bassett investigated the alleged May 2001 incidents at elementary school B. He interviewed Ana M. on May 7, 2001. With respect to the Guadalupe G. incident, Ana M. told the sergeant that she and other girls had been playing Candyland when defendant asked all of the girls except Guadalupe G. to leave. Looking through the door window, Ana M. saw defendant hug Guadalupe G. and touch her buttocks. With respect to the incident involving herself, Ana M. never told the sergeant that defendant touched her breast, although she did indicate he touched her neck and upper chest area with two hands. He put his hand under her shirt while playing hide and seek.

The sergeant interviewed defendant on May 8, 2001. Defendant told the sergeant that he is a "touchy" person who likes to hug children, and that has been misconstrued. Regarding the Ana M. incident, he said that the girls were playing hide and seek and turning the lights on and off. As he was walking to turn on the lights, he ran into a girl, asked her name (Ana M.), and moved her out of the way. He told the girls to return to their classroom. Later that same day, he asked the same girls to help him put silk worms in boxes. At some point, all of them left except Guadalupe G. While talking to her, he hugged her to welcome her back from vacation. He did not touch her buttocks, although his hands may have been on the small of her back. If he did touch her buttocks, it was accidental. Defendant also said he had been told during training not to hug children; it was not a good idea. But he didn't feel there was anything wrong with it.

The videotape of that interview was destroyed after the district attorney rejected filing charges regarding the Guadalupe G. and Ana M. incidents. Videotapes are kept for about one year after the district attorney has refused to file charges. They are then destroyed.

D. *Evidence concerning Los Angeles Unified School District (LAUSD) policies.*

1. Winnie Washington.

In 2002, Winnie Washington was the principal at elementary school C, where defendant taught fourth and fifth grades. On March 1, 2002, she had a regular meeting with teachers to go over LAUSD policies, including no touching of students and leaving classroom doors open. Defendant locked his door numerous times. He also had construction paper covering a door window, but he took it down when Washington asked him to.

2. Javier Miranda.

In May 2001, Javier Miranda was elementary school B's principal. Defendant taught fourth grade at the school. At the beginning of each school year, Miranda held a faculty meeting at which he reviewed school district policies regarding sexual abuse, nondiscrimination, and how staff should conduct themselves, including no physical contact with students and leaving doors open when teachers were with small groups of students.

In May 2001, Guadalupe G. and her father came to see Miranda. Miranda also interviewed Ana M. and Damaris G. On June 29, 2001, Miranda had a discussion with defendant about procedures with students. He told defendant he had failed to exercise good judgment when he went into a room with four students and closed the door. He gave defendant an administrative directive to use better judgment and to refrain from being in settings or circumstances that would lead students or parents to question his actions or intent. He also told defendant that failure to follow these directives could result in disciplinary action. But, in connection with the directives, defendant was not suspended or given a notice of unsatisfactory service. He followed the directives.

II. Procedural background.

On May 1, 2006, a jury found defendant not guilty of count 1, a forcible lewd act upon a child, Sadie T. (Pen. Code, § 288, subd. (b)(1)), but guilty of the lesser offense of a lewd act upon Sadie T. (Pen. Code, § 288, subd. (a)). It found him not guilty of count 2, a lewd act upon a child, Claudia M. (Pen. Code, § 288, subd. (a)) and of count 3, a lewd act upon a child, Guadalupe B. (Pen. Code, § 288, subd. (a)). The jury also found not true the allegation that defendant committed the crimes against more than one victim (Pen. Code, § 667.61, subds. (a)-(d)).

On October 11, 2006, the trial court sentenced defendant to the midterm of six years on count 1.

DISCUSSION

I. The magistrate's ruling at the preliminary hearing dismissing the counts against Guadalupe G. and Ana M.

At the preliminary hearing, the magistrate dismissed counts concerning Guadalupe G. and Ana M. Based on that dismissal, defendant makes three related contentions. First, he contends that the dismissal precluded the prosecution from introducing those incidents as propensity evidence at trial. Second, he contends that the People's section 1108 offer of proof was insufficient as a matter of law because the magistrate used a standard of proof that was lower than a preponderance of the evidence and, under that lower standard, made factual findings fatal to the determination of probable cause. Finally, he contends that the trial court was required to inform the jury of the magistrate's dismissal and findings. After detailing additional facts regarding the preliminary hearing, we address these contentions.

A. *Additional facts regarding the preliminary hearing.*

1. The counts at issue at the preliminary hearing.

The preliminary hearing began on January 13, 2006. It appears that the operative charging document was a second amended complaint dated October 14, 2004. It further appears that count 1 concerned Sadie T.; count 2 concerned Guadalupe G.; count 3 concerned Ana M.; count 4 concerned Claudia M.; count 5 concerned Kayla B.; and

count 6 concerned Guadalupe B.

2. Evidence concerning the 2001 incidents at Elementary School B.

Sergeant Mark Bassett testified about the 2001 elementary school B incidents. In May 2001, he talked to Ana M. She told him that on May 2, 2001, she was in a classroom with three other girls (Guadalupe G., Damaris G. and Paulina A.). They were putting stamps on envelopes. They then played hide and seek. Ana M. saw defendant approach Guadalupe G. from behind and hug her. Guadalupe G. pushed his arms away. Defendant then approached Ana M. from behind and tried to put his hands down the front of her shirt, although Ana M. also said she pulled defendant's hands from inside her shirt. Either later that day or the next day, defendant asked the same girls to help him make boxes for silkworms. At some point, he asked everyone except Guadalupe G. to step out of the room. They did. But through the door window Ana M. saw defendant touch Guadalupe G.'s buttocks with his hand once. Defendant also took Guadalupe G.'s hand and moved it toward his genitals, but Ana M. didn't see Guadalupe G.'s hand touch defendant. Defendant denied touching the girls inappropriately.

Sergeant Bassett also talked to Damaris G. and Paulina A., but he did not talk to Guadalupe G. Damaris G. told him that Ana M. initially told her nothing had happened, but Ana M. later said he touched her neck. Paulina A. did not see any touching as described by Ana M.

Sergeant Bassett interviewed defendant about the alleged incidents.⁷ Defendant said he is a touchy person who hugs kids sometimes. He recalled asking four girls to help him. The girls were playing hide and seek and turning the lights on and off. As he was walking to turn the lights on, he bumped into someone. He put his hand on her shoulder and asked who she was. It was Ana M. He moved her out of the way and turned the lights on. Later that morning, he asked the same girls to help him make boxes for

⁷ Defense counsel objected to this testimony, because the videotape of Sergeant Bassett's interview with defendant had been destroyed. The trial court overruled the objection but said the testimony would be subject to a motion to strike.

silkworms. At some point, all three girls, except Guadalupe G., were outside the room. He hugged Guadalupe G. and he may have touched her buttocks, but his recollection was that his hand was on the small of her back.

Although Guadalupe G. was interviewed by Assistant District Attorney Ken Lamb, Sergeant Bassett was thereafter unable to locate Guadalupe G.

Sergeant Bassett took Guadalupe G., Ana M., Paulina A. and Damaris G. to talk to Assistant District Attorney Ken Lamb, who testified at the preliminary hearing for the defense. Lamb testified that he had extensive training and background in interviewing children. After talking to the children, Lamb rejected the case for filing, stating in his report that “the children were very easily led to make statements that were inaccurate.”

3. The magistrate dismisses the counts concerning Guadalupe G. and Ana M.

The magistrate granted a motion to dismiss counts 2 and 3 regarding Guadalupe G. and Ana M.⁸ The magistrate explained, “I have the uncontradicted testimony of an expert witness who qualified in this case which the court has to take into consideration and cannot disregard, especially in light of the case that the evidence, some of the evidence presented by the District Attorney is subject to two interpretations. [¶] But the thing that convinces the court most that the evidence is not reliable or subject to attack as to reliability and, therefore, if it is subject to attack to reliability, it [might] not be reliable. And it’s the burden of the prosecution to produce reliable evidence upon which the court can make a determination because the standard is always a reasonable-man standard. [¶] And receiving evidence without objection of the District Attorney’s rejection filed by Mr. Lamb who is qualified as an expert in this area, he concludes, and I’m not referring to any of the unredacted portion which the court doesn’t have to consider, he concludes as follows: The children, not the child, the children were easily led to make statements

⁸ Although it dismissed the counts, the magistrate declined to rule on whether the three-year delay in filing those counts after the district attorney rejected it constituted a violation of due process.

that were inaccurate, not that probably were inaccurate, that are reasonably, but were inaccurate. [¶] Therefore, if an expert is called to render an opinion based upon inaccurate information, the expert opinion is only as good as the information upon which it's relied. Therefore, the court finds that there is a reasonable interpretation that the testimony of, at least, Guadalupe G. and Ana M. is inaccurate, having been reviewed by an uncontradicted expert witness and, therefore, the court finds that, with respect to counts two and three, the information, the evidence presented is insufficient upon which the court can make a reasonable determination of the guilt or innocence of the defendant and, therefore, those counts are likewise dismissed.”⁹

The court also advised defendant, “[T]he ruling of the court with respect to the dismissal of this charge does not prevent the District Attorney from re-filing those charges at the time of your arraignment. [¶] And also going to make this also clear, that with respect to the charges that the court has dismissed, the court makes no finding as to their ability of the District Attorney to use those for other purposes such as common scheme or design. Court makes no finding with respect to that. [¶] The court is only making the finding with respect to the sufficiency for the purpose of the preliminary hearing. However, if the People choose to and convince the court pursuant to a [section] 402 motion that that evidence is admissible for other purposes, it may also be used against you.” Defense counsel said he understood.¹⁰

⁹ The magistrate also dismissed count 5, concerning Kayla B. She had been a student at elementary school C. Kayla B. told Detective Curtis Uyeda that defendant hugged her. She felt uncomfortable because his hands were hot. She also said that defendant did not touch any private parts of her body or make inappropriate comments. Detective Uyeda's professional opinion was nothing reported made him suspicious a crime had occurred.

¹⁰ Although the magistrate dismissed the Ana M. and Guadalupe G. counts at the preliminary hearing, the district attorney filed an amended information containing those counts. The trial court thereafter dismissed those counts.

B. *Dismissal of the counts did not preclude their use as propensity evidence.*

Defendant argues that the dismissal of the counts concerning Guadalupe G. and Ana M. precluded their use as propensity evidence under section 1108, which permits the admission of a defendant's uncharged sexual offenses.¹¹ To support this argument, defendant primarily relies on *Jones v. Superior Court* (1971) 4 Cal.3d 660 (*Jones*). In *Jones*, the petitioners were charged with rape, oral copulation and sodomy. After a preliminary hearing, the magistrate dismissed all three charges, finding that the victim went with the petitioners "willingly" and that no force was used. The magistrate said, " 'I don't believe that 288(a) [oral copulation] took place. I don't believe that 286 [sodomy] took place.' " (*Jones*, at p. 664.) Although the charges were dismissed, the district attorney thereafter filed an information charging the petitioners again with rape, oral copulation and sodomy. The court found that since the magistrate made express findings of fact that the crimes did not occur, the district attorney could not include them in the information.

The Court of Appeal in *People v. Farley* (1971) 19 Cal.App.3d 215 at page 221, summarized *Jones*'s rule: "[I]n cases where the magistrate makes factual findings which are fatal to the asserted conclusion that a particular offense was committed, the district attorney may not recharge that offense in the information. A clear example of this would be where the magistrate expresses disbelief of a witness whose testimony is essential to the establishment of some element of the corpus delicti. [¶] Where, however, the magistrate either expressly or impliedly accepts the evidence and simply reaches an ultimate legal conclusion therefrom— i.e., whether or not such evidence adds up to reasonable cause that the offense had been committed—such conclusion is open to challenge by inclusion in the information which action is thereafter subject to attack in

¹¹ Defendant appears to argue that the magistrate's dismissal of these counts should have also precluded propensity evidence concerning Damaris G. Even if the magistrate's ruling did somehow impact the admissibility of propensity evidence, there was no count alleged regarding Damaris G., and it is therefore unclear how the magistrate's decision could impact the admission of propensity evidence concerning her.

the superior court under Penal Code section 995, and ultimately to appellate review.” (See also *People v. Slaughter* (1984) 35 Cal.3d 629.)

Citing this rule, defendant argues that the magistrate here made factual findings fatal to the People’s case; hence, due process precluded the People from using the Ana M., Guadalupe G., and Damaris G. propensity evidence under section 1108.¹² There are at least two problems with this argument.

First, the magistrate did not make factual findings. Rather, the magistrate reached a legal conclusion that the evidence did not add up to reasonable cause that offenses against Ana M. and Guadalupe G. had been committed. The magistrate did not make a clear and express finding, as did the magistrate in *Jones*, that he disbelieved the witnesses and that he found certain conduct did or did not occur. Rather, like in *Farley*, the magistrate here simply concluded that the evidence was insufficient. He therefore said that “the evidence presented is insufficient upon which the court can make a reasonable determination of the guilt or innocence” of defendant. The magistrate also essentially told defendant and his counsel that he was not making factual findings when he informed them the district attorney could refile the charges and it was making no finding concerning whether the charges could be used for other purposes, for example, as propensity evidence.¹³

Second, *Jones* concerns the effect of a magistrate’s dismissal of charges at a preliminary hearing on a prosecutor’s ability to refile the charges. Defendant points out that *Jones*’s holding is based on former section 8, article 1 of the California Constitution. *Jones* described that constitutional provision as “ ‘protect[ing] a person from prosecution in the absence of a prior determination by either a magistrate or a grand jury that such

¹² We discuss section 1108 in greater depth *post*.

¹³ Even if we assumed that the magistrate made a factual finding, that finding would not necessarily render the uncharged crimes inadmissible as propensity evidence under section 1108. As we discuss in Section D, *post*, evidence of uncharged crimes may be admissible in the current case, even where the defendant has been previously *acquitted* of the uncharged crimes.

action is justified.’ [Citations.]” (*Jones, supra*, 4 Cal.3d at p. 664.) This confirms that, at its heart, *Jones* concerns *prosecution* of a charge that has been dismissed. It does not concern the effect a magistrate’s dismissal of charges has on the *admissibility* of evidence under section 1108. Although we see the analogy defendant is attempting to draw between refileing a dismissed charge and using a dismissed charge as propensity evidence, defendant is stretching *Jones*’s holding simply too far.¹⁴

C. *The magistrate did not make factual findings based on a standard of proof lower than a preponderance of the evidence.*

Defendant next contends that the standard of proof for admission of the uncharged 2001 elementary school B incidents was preponderance of the evidence. But because the magistrate made factual findings using a standard of proof *lower* than a preponderance of the evidence, the prosecutor’s offer of proof concerning the incidents was insufficient as a matter of law; hence, the trial court erred in admitting them.

Defendant’s contention is based on the same premise we rejected above—that the magistrate made factual findings concerning the 2001 incidents. He did not. The magistrate’s statement that “there is a reasonable interpretation that the testimony of, at least, Guadalupe G. and Ana M. is inaccurate” cannot be construed as a factual finding they were lying. Rather, the magistrate’s statement is in reference to the testimony of Assistant District Attorney Ken Lamb. He declined to file charges against defendant based on what the girls told him, because he found that they were “easily led to make statements that were inaccurate.” In so finding, Lamb explained that “a child could be

¹⁴ Defendant also argues that the magistrate should have dismissed the Ana M. and Guadalupe G. counts because of prefiling delay. After trial, defendant filed a motion to dismiss for prefiling delay with respect to the 2001 elementary school B incidents. As we noted in footnote 8, *ante*, the magistrate at the preliminary hearing dismissed the Ana M. and Guadalupe G. counts, but it expressly declined to rule on the prefiling delay issue. Even assuming that the dismissal was warranted on that ground, such a dismissal would not have necessarily precluded the trial court from introducing evidence of the Ana M. and Guadalupe G. incidents under section 1108. Dismissal for prefiling delay would not have been a finding of fact, for example, that the incidents did not happen.

telling you the truth that they were molested, yet not be a good witness. . . . [¶] So it doesn't mean the crime did or did not occur, it just comments as to a personality trait at that time of that child." The magistrate, when he then used "inaccurate" to describe Guadalupe G.'s and Ana M.'s statements, was merely echoing what Lamb had said. The magistrate was not stating he disbelieved Ana M., Guadalupe G. and Damaris G. Nor could he have, given that they did not testify at the preliminary hearing.

D. *The trial court did not err by refusing to instruct the jury that the counts concerning Ana M. and Guadalupe G. had been dismissed.*

Defendant offers a third contention based on his faulty premise that the magistrate made factual findings. He contends that the jury should have been instructed that "[o]n January 17, 2006, two charges against the defendant involving Ana M. and Guadalupe G. were dismissed at the conclusion of [the] preliminary hearing." The trial court refused to so instruct the jury, stating that the dismissal was "no more relevant than if I were to take . . . judicial notice that the defendant had not been charged with other crimes A, B, C and D. That's not relevant. And this is not relevant for the same reason."¹⁵ We agree that the trial court did not have a duty to instruct the jury about the dismissal.

Defendant likens the alleged duty to instruct the jury of the magistrate's dismissal of the charges concerning Ana M. and Guadalupe G. to the duty to inform a jury that the defendant was acquitted of an uncharged crime that is being introduced as propensity

¹⁵ Defense counsel responded: "A preliminary hearing requires a burden of proof. And that burden of proof is a standard that all courts have to meet in either dismissing or denying the charges, . . . [¶] So that I think the better argument would be if the court took judicial notice that those counts were dismissed at preliminary hearing and, in fact, they were that the burden of proof is lighter, than the burden of proof required of this jury to even consider applying the other acts[,] propensity, and intent evidence offered by the prosecution under Evidence Code [sections] 1108 and 1101. That standard is as a preponderance of the evidence. And that I do think analogizing it to an acquittal or [] analogizing it to a rejection, it does guide the jury in terms of what the weight of the evidence may be. And that's my proving to the court. It's not simply isolated as an event. It's connected to a burden of proof by which the evidence had to pass and it did not."

evidence. This duty originated in *People v. Griffin* (1967) 66 Cal.2d 459 (*Griffin*). The defendant in *Griffin* was charged with murdering Essie Hodson, after trying to rape her. He fled to Mexico, where he was charged with raping another woman; he was acquitted of that crime. During his trial for Hodson's murder, the trial court admitted evidence of the rape in Mexico. (*Id.* at p. 464.) The California Supreme Court held that the evidence was admissible, but that the trial court erred in excluding evidence that defendant was acquitted of the rape. (*Id.* at p. 465.) The court said a rule requiring the admission of such evidence "is fair to both the prosecution and the defense by assisting the jury in its assessment of the significance of the evidence of another crime with the knowledge that at another time and place a duly constituted tribunal charged with the very issue of determining defendant's guilt or innocence of the other crime concluded that he was not guilty." (*Id.* at p. 466.)

About 30 years after *Griffin*, the Legislature enacted section 1108. It provides: "In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352." (§ 1108, subd. (a); see also *People v. Falsetta* (1999) 21 Cal.4th 903 (*Falsetta*) [section 1108 is constitutional].)

Thereafter, *People v. Mullens* (2004) 119 Cal.App.4th 648 (*Mullens*), considered *Griffin*'s impact on section 1108. In *Mullens*, the defendant was charged with committing lewd acts upon SS, a child, and with the same crime against VA, also a child. A jury found defendant not guilty of the offense as to VA, but deadlocked as to the offenses involving SS. (*Mullens*, at p. 652.) At defendant's retrial for the offenses involving SS, the trial court allowed in evidence of several uncharged offenses, including that he allegedly "french-kissed" VA. But the court excluded evidence of his acquittal for that offense. *Mullens* found that *Griffin* required evidence of the acquittal to be admitted: "To give full meaning to the presumption of innocence in a case in which the prosecution is permitted to present [Evidence Code] section 1108 propensity evidence showing the defendant committed an uncharged sex crime, a trial court must grant the

defense an opportunity to present evidence showing the defendant was acquitted of that alleged uncharged sex offense. In such cases, justice is best served by applying the *Griffin* rule so as to give the trier of fact the opportunity to consider and weigh both types of evidence in reaching a verdict that is based not on who the defendant is, but on what the defendant did.” (*Mullens*, at p. 666.)

Defendant now argues that the rule of *Griffin* and *Mullens* extends to the situation here; namely, where a magistrate has dismissed counts that are then introduced as propensity evidence under section 1108, *Griffin* and *Mullens* require the trial court to advise the jury of the dismissal. We do not think the rule extends quite that far. The *Griffin* court recognized that evidence of other crimes always involves the risk of serious prejudice, for which reason some out of state courts then excluded the other crimes evidence altogether where the defendant had been acquitted of those other crimes. (*Griffin*, *supra*, 66 Cal.2d at p. 466.) But the court found that California’s rule is to admit evidence of the acquittal “to weaken and rebut the prosecution’s evidence of the other crime.” (*Id.* at p. 465.) An acquittal is relevant to that purpose because it speaks to defendant’s guilt or innocence.

Defendant’s attempt to extend the logic of *Griffins* and *Mullens* might be more persuasive had the magistrate here made *factual* findings that we might equate to an acquittal. But, as we have repeatedly said, he did not make such findings. The magistrate instead made a legal conclusion about the sufficiency of the evidence that did not go to the issue of defendant’s guilt or innocence. Moreover, he made that conclusion in the absence of testimony from Ana M. and Guadalupe G., neither of whom testified at the preliminary hearing. Therefore, the trial court did not err in refusing to instruct the jury about the magistrate’s dismissal of the Ana M. and Guadalupe G. counts.

Let us assume, however, that the magistrate’s dismissal was relevant and admissible. Under such a scenario, what might the jury have been told? The jury might have been told, first, that the magistrate dismissed the charges concerning Ana M. and Guadalupe G. Second, the jury might have been told that the basis for the dismissal was a *legal* conclusion the magistrate made, *not a factual one*, as defendant argues. To the

extent the jury would have been informed of the reason or basis for the dismissal, the magistrate made it clear he based his legal finding on the testimony of Assistant District Attorney Ken Lamb.

Lamb's testimony at the preliminary hearing was similar to his testimony at trial. At trial, Lamb said that he has interviewed thousands of children who may be witnesses to or victims of molestation. On May 14, 2001, he interviewed children in connection with an accusation against defendant. After the interviews, he prepared a report. It stated: " 'The victims [were] all within 10- to 12-years old that alleged that the defendant . . . inappropriately touched several of them.' [¶] . . . 'The interview with the children indicated that there was some type of touching, that there is not necessarily any criminal conduct[.]' . . . [¶] 'In addition, the children were very easily led to make statements that were inaccurate.' " Lamb explained that declining to file charges "means nothing more than for a number of reasons, whatever those reasons may be, this case can't go forward. [¶] It's not a comment whatsoever on whether a crime occurred or did not occur – or rarely, I should say, it is on that. It's seldom on that. [¶] It means that you can't proceed for a variety of reasons. Then the statements made, including the last one, are, in essence, a shorthand code to me, telling me the reasons why this case couldn't go forward. [¶] The last statement, 'In addition, the children are very easily led to make statements that were inaccurate' is a test to determine how strong this witness would be on the stand. [¶] It doesn't mean, the crime occurred. It doesn't mean the crime did not occur. [¶] It can be because of maturity. It can be because of age. It could be because they are afraid, they are embarrassed. There's a variety –thousands of reasons. [¶] But one of the tests that I will do is to determine whether or not they are a strong witness. [¶] . . . [¶] . . . The more they allow me to lead them, it doesn't mean the crime didn't occur or occurred. But it means that as a witness on a stand taking questions from lawyers, . . . they are not going to be a strong witness for a variety of reasons. [¶] And that's what that statement tells me. These girls were easily led by me saying things to [me]. That's all it means." Lamb added that being able to easily lead the children does not mean they were lying.

The jury thus had Lamb's testimony before it. Therefore, although they were not told that the magistrate dismissed the Ana M. and Guadalupe G. counts at the preliminary hearing, they jury was told why the district attorney declined to file charges in 2001, which was the basis for the dismissal of charges after the January 2006 preliminary hearing. We therefore would not conclude that the failure to admit evidence of the dismissal was prejudicial. (*Griffin, supra*, 66 Cal.2d at pp. 466-467 [error in excluding evidence admissible under *Griffin* is reviewed under the standard in *People v. Watson* (1956) 46 Cal.2d 818, 836].)

II. The trial court did not abuse its discretion by admitting propensity evidence under section 1108.

Defendant next contends that the trial court abused its discretion by allowing in propensity evidence—Ana M.'s and Damaris G.'s testimony—under section 1108. We disagree.

A. Additional facts.

Before trial, the prosecutor informed the court he was seeking to introduce evidence under section 1108 (as well as section 1101, subdivision (b)); namely, the testimony of Ana M. and Damaris G.¹⁶ The prosecutor said he expected Ana M. to testify she saw defendant hug Guadalupe G.; she saw his hands go to her buttocks; and she saw defendant take Guadalupe G.'s hand and put it towards his groin area. Ana M. would also testify that defendant tried to touch her upper chest area. The court said it would hold a section 402 hearing regarding Ana M.'s testimony about herself, but that her testimony about Guadalupe G. would be admitted. As to Damaris G., the prosecutor said she would testify she saw defendant hug Guadalupe G. and put his hand on her buttocks. Damaris G. would also testify that defendant put his hand on the front part of her neck, under her shirt, and rubbed her neck. The trial court said it would admit

¹⁶ The prosecutor also sought to introduce evidence concerning Kayla B. and the alleged incident at elementary school C, but the trial court excluded it. See footnote 9, *ante*.

Damaris G.'s testimony about Guadalupe G., but that a section 402 hearing would be conducted as to Damaris G.'s testimony about herself.

Defense counsel objected. He pointed out that Guadalupe G., about whom Ana M. and Damaris G. would be testifying, was unavailable, that Assistant District Attorney Ken Lamb declined to file charges against defendant in 2001, that the videotape of Sergeant Bassett's 2001 interview of defendant had been destroyed, and that the evidence was more prejudicial than probative. Thereafter, the section 402 hearings were held.

1. Ana M. section 402 hearing.

Ana M. testified at a hearing under section 402 out of the jury's presence. In May 2001 she was a student at elementary school B. One day during school hours defendant touched Guadalupe G. and Damaris G. While Ana M. was outside a classroom looking in through a door window with Paulina A. and Damaris G., she saw defendant put Guadalupe G. against the corner and start to touch her. She could not see defendant's entire body, but she could see his back. She could not see his hands. Guadalupe G. ran to the door and came out of the room; she was crying. Guadalupe G. said defendant asked her to be his girlfriend, and he started touching her. That same week, she and some other girls were helping defendant staple papers and put stamps on envelopes. They began to play tag. Defendant tagged Ana M., and, while standing behind her, he put his hand inside her shirt. He touched her "breast region," but not her nipple.

The trial court ruled that Ana M.'s statements about what Guadalupe G. told her were inadmissible, but that the ones about herself were admissible, notwithstanding that they might be different from her prior testimony. Before Ana M. testified before the jury, the court said this to the jury: "The testimony of the next witness is being admitted for a limited purpose. And you may consider this for the limited purpose of determining any of the following. [¶] A characteristic[,] method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offenses in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged."

2. Damaris G. section 402 hearing.

Out of the jury's presence, Damaris G. testified that in May 2001, when she was 10 years old, she was in the fourth grade at elementary school B. She was in a room with three other girls (Guadalupe G., Ana M. and Paulina A.). They were playing hide and seek. Defendant came from behind her and rubbed her neck to her chest. She asked what he was doing. He took his hand away and said sorry.

Defendant objected under section 352, and he asserted a violation of his due process rights. The trial court overruled the objections.

B. *Ana M.'s and Damaris B.'s testimony was properly admitted under section 1108.*

Evidence of a person's character or a trait of character is inadmissible when offered to prove the person's conduct on a specified occasion. (§ 1101, subd. (a).) There are two limitations to this general rule. "First, under subdivision (b) of section 1101, evidence that a defendant has committed a crime, civil wrong or some other act may be admissible to prove certain facts, such as 'motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident' In addition, subdivision (a) is subject to certain limitations found in that subdivision itself: '*Except* as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence [of character is inadmissible].' (Italics added.) Section 1108, subdivision (a), provides: 'In a criminal action in which the defendant is accused of a sexual offense, evidence of the defendant's commission of another sexual offense or offenses is not made inadmissible by Section 1101, if the evidence is not inadmissible pursuant to Section 352.' " (*People v. Branch* (2001) 91 Cal.App.4th 274, 280.)

Section 1108 was "intended in sex offense cases to relax the evidentiary restraints section 1101, subdivision (a), imposed, to assure that the trier of fact would be made aware of the defendant's other sex offenses in evaluating the victim's and the defendant's credibility." (*Falsetta, supra*, 21 Cal.4th at p. 911.) Under section 1108, before propensity evidence may be admitted, a trial court must engage in a "careful weighing process under section 352. Rather than admit or exclude every sex offense a defendant

commits, trial judges must consider such factors as its nature, relevance, and possible remoteness, the degree of certainty of its commission and the likelihood of confusing, misleading, or distracting the jurors from their main inquiry, its similarity to the charged offense, its likely prejudicial impact on the jurors, the burden on the defendant in defending against the uncharged offense, and the availability of less prejudicial alternatives to its outright admission, such as admitting some but not all of the defendant's other sex offenses, or excluding irrelevant though inflammatory details surrounding the offense.” (*Falsetta*, at p. 917.) A trial court enjoys broad discretion under section 352 “in determining whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time and this discretion is built into Evidence Code section 1108, subdivision (a).” (*People v. Frazier* (2001) 89 Cal.App.4th 30, 42-43.)

The trial court here did not abuse its discretion. The uncharged crimes were very similar to the charged crimes. The uncharged crimes involved alleged touchings of students at school: Ana M. said defendant put his hand under her shirt; Damaris G. said defendant rubbed her neck and upper chest; and defendant allegedly touched Guadalupe G.'s buttocks. The charged crimes similarly involved alleged touchings of students at school, and touchings of body parts: Sadie T. said defendant touched her buttocks; Guadalupe B. said defendant moved his hand from her shoulder to above her breast; and Claudia M. said defendant hugged her face to face and touched her buttocks. This similarity between the uncharged and charged crimes, increased the probative value of the uncharged crimes. (*Falsetta*, *supra*, 21 Cal.4th at p. 917 [the probative value of other crimes evidence is “increased by the relative similarity between the charged and uncharged offenses, the close proximity in time of the offenses, and the independent sources of [the] evidence (the victims) in each offense”].)

The uncharged crimes also were not remote. They allegedly occurred in 2001, about three years before the charged crimes. Uncharged crimes occurring decades ago have been found to be not remote. (See generally, *People v. Branch*, *supra*, 91 Cal.App.4th at pp. 284-285 [uncharged crimes occurring 30 years ago were not remote];

People v. Frazier, supra, 89 Cal.App.4th at p. 41 [uncharged crimes occurring 15 or 16 years ago were not remote].) Moreover, where, as here, the uncharged and charged crimes are similar, that similarity balances out any remoteness. (*People v. Branch*, at pp. 284-285.)

Defendant, however, argues that the trial court abused its discretion by failing to undertake the weighing process *Falsetta* mandates. He first refers to the trial court's brief statements overruling his objections to admission of the uncharged crimes.¹⁷ Although the court's rulings were brief, the record clearly indicates that the court gave due consideration to admission of the evidence. For example, the court allowed extensive argument about the evidence and, moreover, conducted section 402 hearings before admitting Ana M.'s and Damaris G.'s testimony. We therefore find unpersuasive defendant's attempt to equate the court's brief statements with a failure to weigh the relevant factors.

Next, defendant argues that the trial court failed to consider the degree of certainty of the uncharged crimes' commission. He again points to the magistrate's dismissal of the counts concerning Ana M. and Damaris G. as being relevant to that degree of certainty. As we have said, the magistrate did not make a factual finding that the uncharged crimes did not occur; hence, there were no factual findings for the court to consider in making its decision whether to admit evidence of the uncharged crimes. That the court clearly did consider the degree of certainty of the commission of the uncharged crimes is further demonstrated by its ruling inadmissible the Kayla B. alleged incident.

The record also does not show that the trial court failed to consider the burden on defendant in defending against the uncharged crimes. Defendant argues that it was

¹⁷ For example, after Ana M.'s section 402 hearing, the court responded to defendant's objection: "With respect to the statements that this witness has testified to about herself, whether they [are] dramatically different from any prior testimony, any report, any communication, goes to their weight and credibility, not to their admissibility." After Damaris G.'s section 402 hearing, the court said, "It's more probative than prejudicial. It will be admitted under [section] 352."

unduly burdensome to rebut these uncharged crimes because Guadalupe G., the victim of an alleged touching, was unavailable. The court, however, clearly considered her unavailability, because it precluded Ana M. from repeating Guadalupe G.'s statements to her after the incident. Moreover, Assistant District Attorney Ken Lamb was available to testify for the defense. He testified, as he did at the preliminary hearing, that he declined to file charges against defendant based on Ana M.'s, Damaris G.'s and Guadalupe G.'s allegations because he found they were "easily led" into making inaccurate statements.

Nor did the absence of the videotape of defendant's 2001 interview with Sergeant Bassett about the girls' accusations greatly heighten his burden in defending against the charges. The interview took place in 2001, and defendant was able to recall generally that he probably told the sergeant he was friendly with children, was a "touchy" person, but he did not give students a hug "where the student faced in front of [him] and [he] put [his] arm around the student." Although defendant said he could not recall the interview, he did say he told the sergeant that he does not touch children inappropriately.

We also cannot say that the uncharged crimes necessitated an undue consumption of time. According to defendant, two-thirds of the evidence "related to other acts evidence." In any event, Ana M.'s and Damaris G.'s testimony comprised of 82 pages of a 931-page reporter's transcript. Sergeant Bassett's testimony totals an additional 40 pages. We cannot say that the time consumed on the uncharged offenses so dwarfed the trial on the current charges that defendant was thereby prejudiced.

III. The trial court did not prejudicially err by admitting other acts evidence under section 1101, subdivision (b).

Similar to his contention above with respect to the propensity evidence admitted under section 1108, defendant also contends that the trial court prejudicially erred in admitting certain evidence under section 1101, subdivision (b). We find that no prejudicial error occurred.

A. *Additional facts.*

1. The prosecutor's offers of proof.

The prosecutor stated an intent to introduce evidence that in June 2001, Javier Miranda advised defendant he should not be alone with students or in small groups, and if he was alone with students in classrooms with closed doors, that would result in disciplinary action. Winnie Washington also told defendant in March and April 2002 that it would be inappropriate to be alone with girls. Although the prosecutor placed this evidence in the context of the Kayla B. incident, which had been ruled inadmissible, the prosecutor argued that the evidence shows a common plan or scheme and intent. The trial court said that the “issue of having the principals or teachers testify, I do find it admissible as going to lack of knowledge, motive, etcetera.”

Defense counsel objected to the evidence, and said it suggested something occurred at elementary school C that was wrong or inappropriate. The trial court found the evidence to be more probative than prejudicial under section 352, and admissible under section 1101, subdivision (b).

Later, although the trial court had already ruled that Miranda's and Washington's testimony was admissible, the prosecutor made specific offers of proof regarding their testimony. The prosecutor said that Miranda was elementary school B's principal. He participated in the 2001 investigation and took statements from witnesses, although the prosecutor disclaimed an intent to introduce those statements. Miranda would explain school procedure regarding students and teachers and would testify that he admonished defendant in June 2001 to refrain from being in settings that could lead to misinterpretations of his actions and to refrain from being alone with students or in small groups, and if he did so, to leave the door open. The school district has a policy that no teacher is to touch students.

Washington's testimony would concern an incident on March 11, 2002, when she was the principal at elementary school C. On that day, there was a faculty meeting at which policies, including ones about room environment and settings, were addressed. It

was against school policy to be alone with students and to lock doors. No touching of students was allowed.

2. Winnie Washington's testimony at trial.

At trial, Washington testified on direct examination that school policy forbids touching students and requires doors to be open. Staff may not be alone with children behind locked doors. In March 2002, there was a faculty meeting at which these policies were explained. On cross-examination, Washington said that doors may be closed, but that door windows must then be uncovered. At sidebar during his redirect examination, the prosecutor asked if he could get into whether defendant covered his door window, locked his door, and was alone with three students. Defense counsel objected that this was "fishing into an area that's improper conduct on the part of my client, and he didn't make that offer." Explaining that the prosecutor could address what was brought out during cross-examination, the trial court overruled the objection.

Washington then testified that defendant locked his classroom door many times. She unlocked it. Defendant also covered his door window with construction paper, but he removed the paper after Washington spoke to him about it. Defense counsel moved to strike Washington's testimony regarding the locked door and paper covered window on the grounds it was inconsistent with the offer of proof, violated defendant's due process rights, and under section 352. Defense counsel also argued that this testimony created an impression defendant was engaged in misconduct at elementary school C, although the trial court had expressly ruled that the Kayla B. incident was inadmissible. The court overruled the objections.

3. Javier Miranda's testimony.

Miranda, elementary school B's principal in May 2001, testified at trial that at the beginning of each school year there is a faculty meeting to review school district policies regarding sexual abuse, nondiscrimination, how faculty should conduct themselves to prevent concerns or questions, and the manner in which faculty fulfill their

responsibilities. Faculty are told there is to be no physical contact with students. Faculty should not be with a small group of students unless the classroom door is open.

In May 2001, Miranda participated in an investigation of alleged inappropriate touching by defendant. Guadalupe G. and her father came to see him, and Miranda interviewed Ana M. and Damaris G. He then, in June 2001, had a discussion with defendant about procedures with students. He reminded defendant not to be alone in classrooms with the doors closed with individual students or with a small group. Over defense counsel's hearsay, relevance, and lack of foundation objections, Miranda was asked if he commented to defendant regarding what is inappropriate. Miranda answered that he told defendant he failed to exercise good judgment.

At sidebar, defense counsel said Miranda might testify he told defendant he was in a classroom with the doors closed with four students. He objected to any such testimony because there was "[no] evidence that occurred" and Miranda was not an eyewitness. The trial court replied that the evidence was not being offered for that purpose. It was being offered to show defendant's state of mind, "that is, he was advised that certain things were and were not appropriate . . . because his state of mind is really what is most relevant to the allegations contained, that is whether or not these acts actually occurred, and whether they occurred with the specific state of mind that the law requires." Defense counsel objected on due process grounds and under section 352, saying that the evidence would mislead the jury and confuse them about the relevant facts. The court said it was circumstantial evidence and relevant under section 1101, subdivision (b).

Miranda then testified that he told defendant he failed to exercise good judgment when he went into rooms with four students and closed the door. Over the defense's relevancy and section 352 objections, Miranda then testified that in May 2001 he gave defendant an administrative direction (a mandate or order) to exercise better judgment and to refrain from being in settings or circumstances that would lead students or parents to question his actions or intent. He also told defendant that violating the directive may result in disciplinary action. On cross-examination, Miranda confirmed that, in

connection with the directive, defendant was not suspended or given notice of unsatisfactory service. Defendant followed the directive to the witness's knowledge.

B. *The principals' testimony was admissible.*

As we said above, section 1101, subdivision (b), provides: "Nothing in this section prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act." The categories in section 1101, subdivision (b) are not exclusive. (*People v. Catlin* (2001) 26 Cal.4th 81, 146.) "[T]he admissibility of other-crimes evidence depends upon the materiality of the fact sought to be proved or disproved, the tendency of the uncharged crime to prove or disprove the material fact, and the existence of any policy requiring exclusion of the evidence." (*Ibid.*) Evidence of other crimes must be scrutinized with great care before it is admitted, although on appeal, we review a trial court's ruling under section 1101 for abuse of discretion. (*People v. Gray* (2005) 37 Cal.4th 168, 202.)

Defendant does not appear to take issue with Miranda's and Washington's testimony to the extent they testified about school policies. Indeed, such evidence was relevant, as the trial court said, to defendant's state of mind and to show what conduct was and was not permitted under school policy. What defendant questions is, first, the admission of Miranda's warning to defendant not to be alone with students or with a small group, and, second, Washington's testimony that defendant covered his door window and locked his door.

First, Miranda's warning was admissible. Miranda testified he warned defendant in 2001 not to be alone with a student or with a small group of students. Sadie T. testified that in 2004 defendant touched her while she and Guadalupe B. were with defendant. Guadalupe B. also said that defendant touched her while she was alone with him or with a small group of girls. Miranda's warning had a tendency to show that

defendant being alone with Sadie T. and Guadalupe B. in 2004 was not an accident or mistake. It also went to motive, namely, there was an explanation, other than an innocent one, for defendant placing himself alone in a room with two girls, when he had been warned to avoid such situations. In addition, Miranda's warning went to defendant's intent, and therefore the evidence was also admissible under section 1101, subdivision (b). " 'Evidence of *intent* is admissible to prove that, if the defendant committed the act alleged, he or she did so with the intent that comprises an element of the charged offense. 'In proving intent, the act is conceded or assumed; what is sought is the state of mind that accompanied it.' [Citation.]' [Citation.]" (*People v. Balcom* (1994) 7 Cal.4th 414, 422.)

Defendant counters that because he testified he did not recall the alleged Sadie T. incident, he therefore did not put his intent at issue. He cites, among others, *People v. Willoughby* (1985) 164 Cal.App.3d 1054. In *Willoughby*, the prosecution admitted evidence of an uncharged sex offense to show the defendant's intent to sexually molest the prosecuting witness. The court held that the evidence should not have been admitted. It said, "The problem with the intent theory is that appellant never placed his intent in issue; he categorically denied any sexual involvement with Kathleen. Evidence of sex offenses with persons other than the victim of the charged crime is admissible only when proof of the defendant's intent is *ambiguous*, as when he admits the act and denies the necessary intent because of accident or mistake. . . . Because intent was not in issue and because the trial judge failed to admonish the jury not to consider the evidence as proof of appellant's criminal disposition, the evidence could have been considered by the jury only to prove appellant's disposition to sexually molest children—the very purpose prohibited by Evidence Code section 1101, subdivision (a)." (*Id.* at pp. 1063-1064.) Although defendant did deny that the Sadie T. and Guadalupe B. incidents occurred, his counsel argued in closing that if the Claudia M. touching occurred, it was "an accident" and "unintentional." Therefore, defendant's intent, at least with respect to that count, was at issue.

Second, Washington's testimony that defendant locked his doors and once covered his door window with construction paper was similarly admissible under section 1101,

subdivision (b). The prosecutor's offer of proof regarding Washington's (and Miranda's) testimony was it went to show a common plan, scheme or intent. It is true, as defendant points out, that the girls did not here testify that the alleged incidents occurred behind closed and locked doors or covered door windows. Nonetheless, Washington's testimony did go to establishing that defendant created opportunities to allow touchings to occur. In that sense, the evidence did go to a "plan" or "scheme."

We therefore conclude that the trial court did not err by admitting Miranda's and Washington's testimony.

C. *Instructional error.*

Defendant's final contention regarding evidence admitted under section 1101, subdivision (b), is the trial court failed to instruct the jury how to evaluate the evidence. The court instructed the jury with CALJIC No. 2.50: "Evidence has been introduced for the purpose of showing that the defendant committed *crimes* other than that for which he is on trial. [¶] Except as you will otherwise be instructed, this evidence, if believed, may be considered by you for the limited purpose of determining if it tends to show: [¶] A characteristic method, plan or scheme in the commission of criminal acts similar to the method, plan or scheme used in the commission of the offense in this case which would further tend to show the existence of the intent which is a necessary element of the crime charged. [¶] For the limited purpose for which you may consider such evidence, you must weigh it in the same manner as you do all other evidence in the case." (Italics added.) Defendant argues that this instruction was inadequate because it referred to "crimes" rather than "acts."

Certainly, the subjects of Javier Miranda's and Winnie Washington's testimony were not crimes committed by defendant, but acts. They testified, for example, about school policies, warnings to defendant not to be alone with students, and how he closed his door and once covered his door window with construction paper. Because this

testimony concerned “acts” rather than crimes, the trial court should have included the word “acts” in its instruction. (See, e.g., *People v. Enos* (1973) 34 Cal.App.3d 25, 42.)¹⁸

Defendant points out that the failure to include the word “acts” in the instruction was exacerbated by a failure to specify that this instruction applied to Miranda’s and Washington’s testimony; hence, the jury was not informed how to use that testimony. The jury therefore, in all likelihood, he surmises, treated Miranda’s and Washington’s testimony as propensity evidence, under CALJIC No. 2.50.01,¹⁹ with which the jury was instructed immediately after being given the deficient CALJIC No. 2.50.

We think it unlikely that the jury treated Miranda’s and Washington’s testimony in this manner. The prosecutor in his closing argument specifically said that the disposition evidence referred to in CALJIC No. 2.50.01 concerned Ana M.’s and Damaris G.’s testimony. He did not say that Miranda’s and Washington’s testimony similarly was evidence from which they could infer defendant had a disposition to commit the charged

¹⁸ Defendant does not cite where in record he requested the instruction to be modified. A failure to request a clarifying instruction may waive the claim on appeal. (*People v. Hart* (1999) 20 Cal.4th 546, 622.)

¹⁹ The jury was instructed with CALJIC No. 2.50.01 as follows: “Evidence has been introduced for the purpose of showing that the defendant engaged in a sexual offense on one or more occasions other than that charged in the case. [¶] Sexual offense means a crime under the laws of a state or of the United States that involves any of the following: [¶] Any conduct made criminal by Penal Code section 288[,] [subdivisions] (a) and . . . (b). The elements of these crimes are set forth elsewhere in these instructions. [¶] If you find that the defendant committed a prior sexual offense, you may, but are not required to, infer that the defendant had a disposition to commit sexual offenses. If you find that the defendant had this disposition, you may, but are not required to, infer that he was likely to commit and did commit the crime or crimes of which he is accused. [¶] However, if you find by a preponderance of the evidence that the defendant committed prior sexual offenses, that is not sufficient by itself to prove beyond a reasonable doubt that he committed the charged crimes. If you determine an inference properly can be drawn from this evidence, this inference is simply one item for you to consider, along with all other evidence, in determining whether the defendant has proved guilty beyond a reasonable doubt of the charged crime.”

crimes. Nor did the prosecutor say that their testimony was for the purpose of showing defendant committed a prior sexual offense.

Rather, this is what the prosecutor said about their testimony: “Back in June 2001, in addition to the annual refresher workshops that you are not supposed to touch students, he said that there is a ‘no touch’ policy at L.A. Unified School District. You cannot touch the students unless it’s for a specific purpose. I believe he used the example of—using the correct placement—a person’s hands. He came in here and specifically talked about a meeting that he had with the defendant, that he was not following the regulations, and then further said that you need to not put yourself in a situation that could be misconstrued as misconduct. [¶] Later on in 2002, the defendant, a teacher, over at [elementary school C], the principal there, Mrs. Washington, had the general meeting, you are not supposed to touch the students. In addition to that, she also said specifically to the defendant, you need to take the construction paper off the window, off that door. And on numerous occasions, you are not to lock the door with yourself in the classroom with other students. It didn’t happen? Just once it happened? Numerous times? Now, what’s the whole point of that evidence? *The whole point of evidence specifically about the admonishment or the meeting is basically putting the defendant on notice.* There might have been innocent contact. That’s what he told Sergeant Bassett. I know that’s what he said, but from Sergeant Bassett’s testimony, he said that I’m a touchy person. I may have hugged Guadalupe B., but if I touched the buttocks area, it was by accident. Okay, fine, we’ll give you that. One, if it was an accident, they won’t be able to file the case. [¶] Let’s now fast-forward that to June 2001. Don’t be put in a situation where you are alone with a student or small groups of students. In 2002, Winnie Washington, hey, ‘no touch’ policy, don’t lock your door to these classrooms, take off the construction paper. Now if you see that construction paper, maybe that’s not in and of itself very serious, but considering the fact that there was an allegation of the defendant doing something with Guadalupe B. [sic] and was observed by [the] girls, other girls, Ana M. and Damaris G. through a window looking into a classroom to see what was happening, you know what, what does that show? Ladies and gentleman, that shows consciousness

of guilt. When you take that into consideration, all the warnings, all the girls, all the schools, at these different times, as to these counts, Sadie T., Claudia M., Guadalupe B., the defendant is guilty on all of those counts.” (Italics added.)

Thereafter, the prosecutor repeated that evidence that defendant locked his doors and put construction paper over his door window “[i]n and of itself, it seems minor, I admit. [¶] But when you take that into consideration, all the stuff that was going on at [elementary school B] and all the stuff that was going on at [elementary school A], that is highly relevant. That goes to the state of mind, circumstantially the state of mind, of [defendant].”

The prosecutor thus connected Miranda’s and Washington’s testimony to issues of notice of school policies and that he had been warned about complying with specific policies, namely, not locking his doors and covering his door window. He did not equate those acts with “crimes.” And although the trial court failed to connect CALJIC No. 2.50 to Miranda’s and Washington’s testimony, this was the gist of the prosecutor’s argument. (See *People v. Prieto* (2003) 30 Cal.4th 226, 257-258 [proper to consider counsel’s closing argument to determine whether error in instructing jury was harmless].) We therefore conclude that any instructional error was harmless.

IV. The admissibility of testimony from Sadie T.’s civil attorney.

The trial court precluded defendant from examining Sadie T.’s civil attorney about statements Sadie T. allegedly made to him and from examining Sadie T. about statements she made to her civil attorney. We conclude that precluding defendant from exploring this area did not deprive him of his constitutional right to confrontation and cross-examination.

A. Additional facts.

Defendant sought to introduce the testimony of James McAdams, an attorney representing Sadie T. in connection with a civil claim she filed against defendant and LAUSD. Defense counsel had a conversation with McAdams, the contents of which defendant sought to introduce to impeach Sadie T. Defense counsel had memorialized that conversation in a memorandum. McAdams told defense counsel that Sadie T. was

“on vague side” because of her minor years. McAdams also said that the touching was not under the clothing, it was a single incident, and there were no other immediate witnesses.

McAdams represented to the trial court that his conversation with defense counsel preceded any conversation with Sadie T. He denied discussing any of the underlying allegations with Sadie T. as of the date of his conversation with defense counsel; therefore, McAdams’s statements to defense counsel were not based on anything Sadie T. said to McAdams. By his statement to defense counsel he was not implying that because of Sadie T.’s minor years she was vague. Rather, his discussion was general, for the purposes of settling the civil suit, and not based on anything the witness or her parents said to him, although he did get a brief summary from the parents about what happened. The parents told him there was an offensive touching involved and there was another girl in the room, “ ‘but not immediately present[,]’ ” meaning she was not in a position necessarily to have witnessed anything.

The trial court ruled that McAdams could not be called to impeach Sadie T. The court found that his comments could not be attributed to her because they were based on his supposition, “and, therefore, it’s not impeachable material.”

Defense counsel, however, also asked for records regarding what Sadie T.’s parents told McAdams. McAdams objected, citing the attorney-client privilege and work product doctrine. McAdams also represented that he had no written record of anything Sadie T.’s parents told him; he only had notes. Defense counsel took the position he was entitled to them if they memorialize that the parents had a different account than what Sadie T. said in court. He therefore asked the court to file the notes under seal. The court asked for authority and took the matter under submission.

Immediately thereafter, the parties gave their opening arguments, and the People called their first witness, Sadie T. During cross-examination, defense counsel asked Sadie T. if she talked to James McAdams. She said yes, but that she didn’t know anything about a lawsuit. They merely talked about whether she wanted to testify. Defense counsel asked Sadie T. what she told McAdams happened at the school, but the

trial court stopped this line of questioning, although it said it would allow counsel to ask her questions about preparing for the criminal trial if her civil attorney was present. Defense counsel then asked Sadie T. what she told her parents about what happened at school and whether she told them something different than what she said in court. Hearsay objections to both questions were sustained.

Thereafter, at defense counsel's request, the trial court, before the jury, took judicial notice "[t]hat on October 28th, 2005, Attorney James McAdams filed a lawsuit on behalf of Sadie T. with Ruth T. acting as guardian against [defendant]." The court said it would take notice of the fact a lawsuit was filed, but not of the contents of the lawsuit.

B. *The trial court did not err by precluding testimony from McAdams and from Sadie T. about her conversations with McAdams.*

Based on the trial court's ruling prohibiting his defense counsel from introducing impeachment and financial bias evidence, defendant claims that his constitutional right to a fair trial was denied. He relies on *Vela v. Superior Court* (1989) 208 Cal.App.3d 141 (*Vela*). In *Vela*, police officers gave statements to the SIT, an investigatory committee under the control of Culver City's chief of police. (*Id.* at pp. 144-145.) The statements concerned a shooting incident in which the officers were involved and were given for use by the city attorney in the event of a future civil action. A criminal defendant involved in the shooting incident subpoenaed the documents, but the trial court precluded their disclosure, finding that the attorney-client privilege was applicable.

Vela first noted that the attorney-client privilege is a statutory privilege, which "must be balanced against a criminal defendant's constitutional rights of confrontation and cross-examination." (*Vela, supra*, 208 Cal.App.3d at p. 147.) The court further noted that " "[a]bsent some governmental requirement that information be kept confidential for the purposes of effective law enforcement, the state has no interest in denying the accused access to all evidence that can throw light on issues in the case, and in particular it has no interest in convicting on the testimony of witnesses who have not been as rigorously cross-examined and as thoroughly impeached as the evidence

permits.” ’ [Citations.] As the court stated in *Hammerly v. Superior Court* (1979) 89 Cal.App.3d 388, 402, ‘The judiciary has a solemn obligation to insure that the constitutional right of an accused to a fair trial is realized. If that right would be thwarted by enforcement of a statute, the statute . . . must yield.’ ” (*Vela*, at p. 148.) *Vela* thus concluded that the City could not protect from “disclosure written statements of the very police officers whose trial testimony will be necessary to prove the criminal charges filed against the defendants. In such circumstances adherence to a statutory attorney-client privilege must give way to pretrial access when it would deprive a defendant of his constitutional rights of confrontation and cross-examination.” (*Id.* at pp. 150-151.)

Defendant’s argument here does not appear to be that *Vela* permits the wholesale admission in a criminal trial of a prosecuting witness’s statements to her civil attorney. Indeed, *Vela* does not stand for that proposition. *Vela* concerns a specific and limited discovery request, not a wholesale commutation of the attorney-client privilege between a civil attorney and his or her client, where the client is a witness in a criminal matter. The court thus said, that defendant’s entitlement to discovery is not “absolute”; the attorney-client privilege “may be overridden only if, and to the extent, necessary to ensure defendant’s constitutional rights of confrontation and cross-examination.” (*Vela, supra*, 208 Cal.App.3d at p. 151.) *Vela* does not authorize a general fishing expedition into, for example, what Sadie T. generally told her civil attorney.

Nor does *Vela* compel us to conclude that defendant’s constitutional rights of confrontation and cross-examination required the trial court to allow examination of McAdams as requested by defense counsel.²⁰ McAdams represented that he had not yet talked to Sadie T. when he talked to defendant’s counsel. The trial court was within its discretion to believe that representation. Therefore, McAdams could not have been

²⁰ Defendant does not appear to dispute the applicability of the attorney-client privilege and work product doctrine to Sadie T.’s statements to McAdams and McAdams’s notes.

repeating statements Sadie T. made to him which defendant could have then used at the criminal trial to impeach her.²¹

McAdams did say he had talked to Sadie T.'s parents, who told him an offensive touching occurred and there was another girl (Guadalupe B.) in the room during the touching, but she was "not immediately present," meaning she was in the room but not in a position necessarily to have witnessed anything. The statement is clear that Guadalupe B. was present, as Sadie T. testified.²² Therefore, the statement, to that extent, has no impeachment value. And whether or not the parents or Sadie T. knew what, if anything, Guadalupe B. witnessed, the trial court could have concluded that the statement was too vague and speculative on that issue to impeach either Sadie T. or Guadalupe B. We therefore cannot agree that the failure to allow defendant to cross-examine McAdams about it was error.

We similarly do not agree that the trial court prohibited defendant from exploring potential financial bias. The court took judicial notice of the fact Sadie T. had filed a civil lawsuit against defendant. Notice of that fact certainly alerted the jury that Sadie T. might have a bias. Moreover, Sadie T. said she did not know anything about the lawsuit, so it is unclear that additional questions about what specific damages the lawsuit was seeking would have been fruitful.

In any event, the trial court did not definitively prohibit defendant from exploring the areas in dispute. Before Sadie T. testified, the court asked for briefing on the attorney-client privilege issue. Defendant points out he had no time to brief the issue

²¹ The People offer another reason why McAdams statements to defendant's trial counsel were inadmissible. McAdams said that he made the statements for the purpose of settlement. The People therefore argue that they are also inadmissible under sections 1152 and 1154. We need not reach this argument, although we do note that defendant's trial counsel, Daniel Davis, was representing defendant only in the criminal trial, not in the civil lawsuit Sadie T. filed against defendant.

²² The statement is also in accord with Kim Polk's statement at trial that Sadie T. told her Guadalupe B. was present during the incident.

before Sadie T. testified and he had to cross-examine her. But the record does not show that defendant ever gave the court the briefing requested and requested any appropriate relief, such as recalling Sadie T., based on that briefing. Under these circumstances, no error occurred.

V. The trial court did not err in precluding the introduction of “corroboration” evidence.

Defendant contends that the trial court prejudicially erred when it prohibited him from introducing two pieces of corroborating evidence (a) his “most embarrassing moment” and (b) his pornography-free home computer. No prejudicial error occurred.

A. Defendant’s “most embarrassing moment.”

Defendant testified. He said that on the day the Sadie T. incident occurred he gave a lesson on public speaking. He videotaped his students telling their most embarrassing moments. Defendant began by telling them about *his* most embarrassing moment. He was at his son’s hockey game. On his way to get a snack, he saw a woman who he thought was his wife. He pinched the woman’s buttocks. It was not his wife. It was his son’s coach’s wife. Thereafter, Sadie T. told defendant during recess that she did not want to participate in the assignment, and she did not return to class.

Before defendant testified, he had tried to introduce evidence of this “most embarrassing moment” by cross-examining Sadie T., Claudia M., and Griselda L. about the assignment and by introducing the videotape. Defense counsel argued that the evidence went to the children’s state of mind, but the trial court refused to allow cross-examination about it.

Only relevant evidence is admissible. (§ 350.) Relevant evidence is evidence “having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action.” (§ 210.) “The test of relevance is whether the evidence tends ‘logically, naturally, and by reasonable inference’ to establish material facts such as identity, intent, or motive. [Citations.]’ [Citation.] The trial court has broad discretion in determining the relevance of evidence [citations].” (*People v. Scheid* (1997) 16 Cal.4th 1, 13-14.)

The “most embarrassing moment” was relevant to corroborate defendant’s version of events and, as he explained at trial, to the girls’ state of mind. A reasonable inference from this evidence is the public speaking assignment influenced Sadie T.’s story. Notwithstanding the trial court’s refusal to permit cross-examination of the girls about this assignment, the inference could not have been lost on the jury. Defendant was allowed to testify about the assignment during his case-in-chief. He clearly testified he told the class this story and Sadie T. told him she didn’t want to participate. Given defendant’s testimony, we cannot say that the earlier exclusion of the evidence was prejudicial. Our conclusion is buttressed by Sadie T.’s testimony—before the prosecutor was able to object—that she did not remember defendant telling the class the story. Therefore, it does not appear that even if defense counsel had been allowed to explore the issue with Sadie T., she would have recalled it.

B. *Defendant’s computer.*

During direct examination of defendant, his counsel asked if his home computer was seized. Defendant answered, “yes.” The prosecutor objected on relevance grounds. At sidebar, defense counsel said that defendant’s computer had been taken and searched. No pornography was found on it. Defense counsel pointed out that if pornography had been found, “it would be in front of the jury.” The court ruled the evidence irrelevant, and struck defendant’s answer.

Defendant’s point that any child pornography found on his computer probably would have been admitted is well-taken. (See, e.g., *People v. Memro* (1995) 11 Cal.4th 786, 864-865 [photographs and magazines depicting clothed and unclothed youths found in the defendant’s possession were admissible to show defendant’s intent to molest a child; they “yielded evidence from which the jury could infer that he had a sexual attraction to young boys and intended to act on that attraction”].) Nonetheless, we cannot say that the trial court abused its discretion by excluding evidence of the *absence* of pornography on his computer. It was not an abuse of discretion to conclude that while child pornography can be introduced to show a defendant has a sexual interest in children, the absence of it does not necessarily show that a defendant does *not* have such

an interest. The inference that may be drawn from the absence of child pornography is weaker than the one that may be drawn from its presence.

VI. The prosecutor's closing argument.

Defendant contends that the prosecutor committed prosecutorial misconduct when he alluded to the victims' race and suggested that defendant selected Hispanic girls as his victims. We find that the prosecutor did not commit misconduct.

"The applicable federal and state standards regarding prosecutorial misconduct are well established. ' "A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct 'so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process.' " ' [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves ' " 'the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury.' " ' [Citation.] As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion—and on the same ground—the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety. [Citation.] Additionally, when the claim focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion. [Citation.]" (*People v. Samayoa* (1997) 15 Cal.4th 795, 841.)

"Prosecutorial argument that includes racial references appealing to or likely to incite racial prejudice violates the due process and equal protection guarantees of the Fourteenth Amendment to the federal Constitution." (*People v. Cudjo* (1993) 6 Cal.4th 585, 625-626.) In *Cudjo*, the prosecutor, to persuade the jury to reject defendant's testimony that the victim consented to sexual intercourse, said, " 'And what [defendant] wants you to believe, and what I believe to be perhaps the most telling thing in this whole case, is that this woman who, from all appearances is a happily married mother of three trying to make ends meet living out there where they can have a house they can afford, taking in sewing to help meet the family budget, keeping that kind of a house, that this

woman is going to have intercourse with a strange man—frankly any man—a Black man, on her living room couch with her five year old in the house.’ ” (*Id.* at p. 625.) The court held that the argument was misconduct, albeit nonprejudicial.

What the prosecutor said in *Cudjo* is distinguishable from what the prosecutor here said. During his rebuttal closing argument, the prosecutor said, “But what’s eerily apparent is that there is a pattern here. The setting is the same. It’s a classroom setting. It’s always girls, either in the 4th or 5th grade, and it’s always in a classroom. And it’s eerily apparent from how you viewed it that these girls—I mean, I’m not going to hide the pink elephant—but that all of these girls were – appeared to be Hispanic, a certain type.”

Defense counsel did not immediately object. Instead, the next day, before the jury began deliberations, he objected and moved for a mistrial. He pointed out that defendant is a bilingual specialist and that the majority of students at elementary school A and elementary school B were Hispanic. Defense counsel also noted that he and defendant were “White Caucasian males” and there were at least four jurors who appeared to be Hispanic. Counsel asked the court to admonish the jury that the ethnicity or race of the parties, witnesses, or other persons should not be discussed or considered in deliberations or in rendering the verdicts.

The trial court overruled the objection and denied the mistrial motion. The court found that it was not a “racial statement,” but one of fact indicative of intent or modus operandi. The court further found it to be “highly probative and highly relevant under [sections] 1101 and 1108.”

We agree that the argument did not amount to misconduct. The challenged comment was made in the context of discussing defendant’s so-called modus operandi, namely, his victims were all female students in the fourth or fifth grade. To this context, the prosecutor added the fact they were Hispanic, a fact the jury could determine for itself based on viewing the witnesses. A comment on race in this context is wholly different than the comment in *Cudjo*, which had no other purpose than to appeal to racial prejudice. No misconduct occurred.

VII. Cumulative error.

Defendant contends that the cumulative effect of the purported errors undermined the fundamental fairness of the trial. As we have “ ‘either rejected on the merits defendant’s claims of error or have found any assumed errors to be nonprejudicial,’ ” we reach the same conclusion with respect to the cumulative effect of any purported errors. (*People v. Cole* (2004) 33 Cal.4th 1158, 1235-1236.)

VIII. The petition for writ of habeas corpus.

Defendant has also filed a petition for writ of habeas corpus, which we ordered to be considered with the appeal. The writ asserts that new evidence requires a new trial. (See generally, *In re Hardy* (2007) 41 Cal.4th 977, 1016 [“A criminal judgment may be collaterally attacked on habeas corpus on the basis of newly discovered evidence if such evidence casts ‘fundamental doubt on the accuracy and reliability of the proceedings. . . . [Citations.]’ ”]) We disagree that the new evidence requires a retrial.

Just days after the trial court sentenced defendant, Sadie T. testified on October 13, 2006 at a deposition taken in connection with her civil lawsuit against defendant. In reference to the incident, she said that she and Guadalupe B. went with defendant to get candy from his classroom. Defendant was at his desk, and Sadie T. was at his right side looking through an origami book. She then testified:

“Q. What happened next?

“A. He touched me.

“Q. Okay. Can you describe that for me?

“A. His hand was on my shoulder, and he, like, slide down my back, and then went to my butt.

“Q. And did he grab your butt?

“A. No.

“Q. Pardon?

“A. No.

“Q. And how long did he have his hand on your butt?

“A. Like, I – I just felt his hand, and then I moved. [¶] . . . [¶]

“Q. Okay. And how long was it between the time that he touched your butt and the time you moved away?

“A. I don’t know.”

After a brief break, Sadie T.’s testimony continued:

“Q. Okay. Now, can you show me with your hand where Mr. Duffin touched you the time that we just finished talking about when you went to his classroom to get candy with Guad[alupe]? Put your hand on the parts of . . . your body that he touched, please[.]

“A. But it’s hard.

“Q. Well, I know. [¶] So he touched you here (indicating); right?

“A. Yeah.

“Q. And I’m touching–touch–can you touch yourself there on your shoulder? [¶] So that’s where he touched you first; right? [¶] And then he slid his hand down your back – his hand down your back; right? [¶] Am I doing it, sort of?

“A. Yeah.

“Q. And then he grabbed – he touched your butt; right?

“A. Yeah. [¶] . . . [¶]

“Q. I know this is a little bit embarrassing, but if you could stand up and show us where he touched your butt, please. [¶] . . . [¶] Touch–show me–stand up and show me where he touched your butt.

“A. He didn’t really touch my butt, though.

“Q. He didn’t?

“A. Not – well, it was, like – it was, like, right here (indicating).” Sadie T. then stood and placed her hand on the right side of her rear right pants pocket.²³ Sadie T. said Guadalupe B. “didn’t really see none of this. She didn’t see it.”

²³ We have reviewed the deposition video.

Defendant characterizes Sadie T.'s deposition testimony as "materially different" than her trial testimony on a crucial point, namely, whether defendant touched her buttocks. We do not agree with this characterization. Where Sadie T. placed her hand when asked to demonstrate the touching is certainly open to different characterizations. But it cannot be said that Sadie T., although she did not call the area touched her "buttocks area," was not in fact in the area of her buttocks. Thus, this is not the type of newly discovered evidence that completely undermines the entire structure of the case upon which the prosecution was based. (*In re Hardy, supra*, 41 Cal.4th at p. 1016.) The petition for writ of habeas corpus must therefore be denied.

DISPOSITION

The judgment is affirmed. The petition for writ of habeas corpus is denied.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ALDRICH, J.

We concur:

CROSKEY, Acting P. J.

KITCHING, J.